Victory Investment Co Sdn Bhd v Pentadbir Tanah Daerah, Johor Bahru & Anor

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24M-256–09 OF 2011
GUNALAN MUNIANDY JC
17 APRIL 2012

Land Law — Acquisition of land — Compensation — Objection against adequacy of compensation — Delay — Estoppel — Application to enlarge time to file objection — Objection raised six years after issuance of Forms G and H — Land owner having accepted full payment of award without protest — Whether land owner estopped from making objection — Whether special circumstances existed to enlarge time — Land Acquisition Act 1960 ss 29, 30(b), 37 & 38(4)

Parts of two pieces of land (Lots 1818 and 2026) belonging to the plaintiff were acquired under the Land Acquisition Act 1960 ('Act') for the construction of a highway. Pursuant to an inquiry, the first defendant ('D1') awarded vide two Forms G dated 8 December 2005 the sum of RM8,444,800 as compensation for the partial acquisition of Lot 1818 and RM31,088,070 for partial acquisition of Lot 2026. In accordance with s 16(1) of the Act, D1 also served on the plaintiff two separate Forms H dated 8 December 2005. On 17 January 2006, the plaintiff's representative unconditionally accepted both offers of compensation. D2 was the paymaster for the above acquisition and D2 forwarded to D1 cheques for the total compensation awarded in respect of both lots. The plaintiff filed this originating summons seeking leave to enlarge time to file objections against the compensation awarded to the plaintiff by D1.

Held, dismissing the application with costs.

(1) The thrust of the present application was that D1 had committed an 'administrative error' in the apportionment of the award for Lot 1818 and Lot 2026. This was being raised for the first time six years after issuance of Forms G and H by D1. As the plaintiff had accepted full payment of the award in respect of Lot 2026 and 75% payment in respect of Lot 1818, without protest or objections s 30(b) of the Act of the Act applied. Section 30(b) is a mandatory provision governing a landowner's entitlement to make an objection to an award. It bars him from pursuing his claim under s 37 in court once he has unconditionally accepted payment. The plaintiff was not entitled to refer its claim to the court under s 37. Hence, the question of enlargement of time to file the reference in court did not arise as the plaintiff was not competent to make the claim (see paras 10–15).

(2) By reason of what is clearly spelt out in s 29, this application should be dismissed outright without even considering whether the plaintiff was entitled to be granted extension of time under s 38(4) of the Act. The plaintiff was already estopped from referring its claim to the court (see para 15).

(3) The court is empowered to enlarge time beyond the six weeks prescribed on condition that special circumstances exist. This is in the case of a plaintiff who has the locus or right to challenge the award by not accepting the award or accepting it under protest which did not apply to the present plaintiff. However, the discretionary power under s 38(4) must be exercised cautiously and judicially bearing in mind that it is mandatory that special circumstances must be shown to exist before enlargement of time can be granted. The onus lies on the plaintiff to satisfy the court that such circumstances do in fact exist. An important factor that would warrant serious consideration is whether there was an inordinate delay in filing the application under s 383(a). A delay running into years — almost 6 years in the instant case — would pose an insurmountable obstacle to allowing reference of the claim to the court (see para 20).

[Bahasa Malaysia summary

Sebahagian daripada dua bidang tanah (Lot 1818 dan 2026) yang dimiliki oleh plaintif diambilalih di bawah Akta Pengambilan Tanah 1960 ('Akta') untuk pembinaan lebuh raya. Berikutan siasatan, defendan pertama ('D1') diawardkan melalui dua Borang G bertarikh 8 Disember 2005 berjumlah RM8,444,800 sebagai pampasan untuk sebahagian pengambilan Lot 1818 dan RM31,088,070 untuk sebahagian pengambilan Lot 2026. Mengikut s 16(1) Akta, D1 juga menyerahkan kepada plaintif dua Borang H yang berasingan bertarikh 8 Disember 2005. Pada 17 Januari 2006, wakil plaintif tanpa syarat menerima kedua-dua tawaran pampasan tersebut. D2 adalah juru bayar untuk kedua-dua pengambilan tersebut dan D2 menyerahkan cek-cek kepada D1 untuk jumlah keseluruhan pampasan yang diawardkan berkaitan kedua-dua lot. Plaintif memfailkan saman pemula ini memohon izin untuk melanjutkan masa untuk memfailkan bantahan terhadap pampasan yang diawardkan kepada plaintif oleh D1.

Diputuskan, menolak permohonan dengan kos.

(1) Teras permohonan ini adalah bahawa D1 telah melakukan 'administrative error' di dalam pembahagian award untuk Lot 1818 dan Lot 2026. Ini dibangkitkan untuk kali pertama enam tahun selepas pengeluaran Borang-Borang G dan H oleh D1. Memandangkan plaintif menerima bayaran penuh award berkaitan Lot 2026 dan bayaran 75% payment berkaitan Lot 1818, tanpa bantahan dan bangkangan s 30(b) Akta diguna pakai. Seksyen 30(b) adalah peruntukan mandatori

mengawal hak pemilik tanah untuk membuat bantahan kepada award. Ia menghalangnya daripada meneruskan tuntutannya di bawah s 37 di mahkamah apabila dia menerima bayaran tanpa syarat. Plaintif tidak berhak untuk merujuk tuntutannya kepada mahkamah di bawah s 37. Maka, persoalan pelanjutan masa untuk memfailkan rujukan di mahkamah tidak berbangkit memandangkan plaintif tidak kompeten untuk membuat tuntutan (lihat perenggan 10–15).

(2) Atas alasan seperti apa yang ditetapkan di dalam s 29, permohonan ini patut ditolak terus tanpa mempertimbangkan sama ada sama ada plaintif berhak untuk diberikan pelanjutan masa di bawah s 38(4) Akta. Plaintif telah diestop daripada merujuk tuntutannya kepada mahkamah (lihat perenggan 15).

(3) Mahkamah diberi kuasa untuk melanjutkan masa melampaui enam minggu seperti yang ditetap atas syarat wujud keadaan khas. Ini dalam kes plaintif yang mempunyai locus atau hak untuk mencabar award dengan tidak menerima award atau menerimanya di bawah bantahan yang mana tidak diguna pakai kepada plaintif ini. Walau bagaimanapun, kuasa budi bicara di bawah s 38(4) mesti dilaksanakan secara berhati-hati dan secara kehakiman mengambil kira bahawa ia adalah mandatori bahawa keadaan khas mesti ditunjukkan wujud sebelum pelanjutan masa diberikan. Beban terletak ke atas plaintif untuk memuaskan mahkamah bahawa keadaan sedemikian sebenarnya wujud. Faktor penting yang mewajarkan pertimbangan serius adalah sama ada terdapat kelewatan terlampau dalam memfailkan permohonan di bawah s 383(a). Kelewatan berterusan bertahun-tahun — hampir enam tahun dalam kes ini — akan menimbulkan halangan yang tidak dapat diatasi untuk membenarkan rujukan tuntutan kepada mahkamah (lihat perenggan 20).]

Notes

For cases on compensation, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2194–2241.

Cases referred to

Lau Cher Hian v Collector of Land Revenue, Muar [1971] 1 MLJ 96, FC (refd)

Lee Ah Mok & Ors v Pentadbir Tanah Daerah Seremban & Anor [2009] 5 MLJ 422, CA (refd)

Malakoff Bhd & Anor v Pentadbir Tanah, Kedah [2004] 1 MLJ 569, FC (refd)

Singapore Para Rubber Estate Ltd v Pentadbir Tanah Daerah Rembau, Negeri Sembilan [2008] 6 MLJ 763, FC (refd)

Sungei Bongkoh Estate Sdn Bhd v Pentadbir Tanah Daerah Kuala Muda [1994] MLJU 441, HC (refd)

Zainal Abidin bin Yaakub v Pentadbir Tanah Daerah Melaka Tengah [1996] 5 MLJ 577, HC (refd)

Legislation referred to

Land Acquisition Act 1960 ss 14, 14(2), 16(1), 29, 30(b), 37, 37(1), 38, 38(3)(a), (4), 39(b), Forms G, H, N
Federal Constitution art 13
Highway Authority Malaysia (Incorporation) Act 1980 s 11

Abdul Khalid bin Abdul Rahman for the private appraiser.
KT Tan (Vincent Tan with him) (Lim Kian Leong & Co) for the plaintiff.
Shahrizal bin Shaari (Anis Wahidah Mohamed wih him) (Assistant Legal Advisor, Office of Legal Advisor) for the first defendant.
Ramesh Sanghvi (Bharti Seth with him) (Kassim Tadin, Wai & Co) for the second defendant.
Mohamad Masri bin Jeinaen (JPPH) for the government valuer.

Gunalan Muniandy JC:

[1] This is an originating summons by which the plaintiff applied for leave to enlarge time to file objections against the compensation awarded to the plaintiff by the Land Administrator Johor Bahru (first defendant — 'D1') in respect of acquisition of land held under Grant 2927, Lot 1818 and Grant 27360, Lot 2026, Mukim Sg Tiram, Johor Bahru.

[2] The second defendant ('D2') is a body incorporated under the Highway Authority Malaysia (Incorporation) Act 1980 ('HAMA 1980') and also a statutory agency functioning under the Ministry of Public Works Malaysia under s 11 of the HAMA 1980 its statutory duty is to supervise and execute the design, implementation and construction of highway for the Government of Malaysia.

[3] The present acquisition arose out of the government's decision, in principle, to construct the Senai Pasir Gudang Desaru Expressway ('the Highway Project'). As a result, the above lands (Lots 1818 and 2026) of which plaintiff was the registered owner, were acquired vide Gazette Notification No 2390 dated 18 November 2004 under the Land Acquisition Act 1960 ('LAA').

[4] Lot 1818 was 431,369 sq mt in area out of which an area of 6,219,005 sq mt was acquired whereas for Lot 2026 the portion acquired was 318,550.739 sq mt out of a total land area of 11,347,367 sq mt.

INQUIRY HELD BY THE FIRST DEFENDANT

[5] Based on this inquiry, the first defendant ('D1') awarded vide two separate Forms G both dated 8 December 2005 issued under s 14 of the LAA 1960 the sum of RM8,444,800 as compensation for the partial acquisition of

Lot 1818 and RM31,088,070 for partial acquisition of Lot 2026. In accordance with s 16(1) LAA, D1 also served on the plaintiff's two separate Forms H both dated 8 December 2005. On 17 January 2006, the plaintiff's representative unconditionally accepted both offers of compensation and the Valuer's fees awarded.

[6] D2 was the paymaster for the above acquisition. As required under the LAA 1960, D2 forwarded to D1 cheques for the total compensation awarded in respect of both lots.

[7] As the time frame to file objections (Form N) under s 38(3)(c) of the LAA 1960 had lapsed, D2 through their solicitors applied for extension of time to do so. By a consent order dated 10. May 2010 by the Johor Bahru High Court D2 was granted an extension of time to file Form N in respect of Lot 1818. D2 filed the Form N on 20 May 2010. In respect of Lot 2026, D2 did not proceed with the application for extension of time and hence, to date there is no objection filed against this award.

WHETHER THE PLAINTIFF ESTOPPED FROM FILING OBJECTIONS

[8] D2 submitted that based on the two Forms H, the plaintiff had unequivocally and unconditionally accepted D1's award of compensation for both lots. The plaintiff had at no time after 8 December 2005 or 17 January 2006 filed any protest or objections with D1 to the compensation awarded for either or both of the two lots or as to the apportionment of compensation thereof as stated in the respective Forms G and H. Form G in respect of both lots states that the award was accepted without objections ('Terima Tanpa Bantahan'). The plaintiff had also received in full the entire compensation award of RM35,068,280 in respect of Lot 2026 and 75% of the compensation award in respect of Lot 1818 amounting to RM6,333,600. As such, it was contended that the plaintiff should be estopped from applying to the court for leave to file Form N some five years ten months after receipt of the moneys. Further, that the plaintiff had no locus or right to file this application for leave as it was a blatant abuse of the process of the court. Section 37 of the LAA 1960 governs the right to apply to the court to challenge the award of the land administrator. In *Lee Ah Mok & Ors v Pentadbir Tanah Daerah Seremban & Anor* [2009] 5 MLJ 422, the Court of Appeal held:

> The locus or right to apply to court to challenge the award is governed by s 37 of the Land Acquisition Act 1960 (Act 486) ('the Act'), whereby only a person who either has not accepted the award or has accepted under protest, is entitled to apply to court to challenge the award. Further, pursuant to s 30(b) of the Act, any person who has received payment of the award other than under protest, shall not be entitled to require his claim be referred to the court under the above section. Section 30(b) is a

A mandatory provision, as once a person has received an award without protest he is estopped from protesting later, based on the doctrine of election. It was the contention of the second respondent that the appellants in 1994 had accepted part of the award without any protest. With that acceptance, the challenge as against the award was extinguished and the appellant was statutorily barred from protesting further. According to the SIC the land reference proceedings is an abuse of the process of law now that the appellants have received the award without any protest.

[9] On the issue of the finality and conclusiveness of the award where s 37 of the LAA has not been invoked, the Federal Court in *Malakoff Bhd & Anor v Pentadbir Tanah, Kedah* [2004] 1 MLJ 569 held:

> The respondent as the Land Administrator cannot invoke s 37 of the Act. If the appellant himself had not invoked s 37 of the Act by objecting to the amount of compensation awarded, the matter rests there and the respondent cannot proceed further. The award made by the Land Administrator is then final and conclusive and was binding on the Government. To that limited extent, counsel for the appellants may be right (see paras 52–53). *Hamidon bin Ahmad v Collector of Land Revenue, Jasin* [1970] 1 MLJ 202 and *Exra v Secretary of State for India* (1905) ILR 32 Cal 605 PC distinguished.

[10] The thrust of the present application is that D1 had committed an 'administrative error' in the apportionment of the award for Lot 1818 and Lot 2026. This is being raised for the first time six years after issuance of Forms G and H by D1. In this regard, s 14(2) of the LAA 1960 provides:

> Every award prepared under subsection (1) shall be filed in the Dffice of the Land Administrator and shall be final and conclusive evidence of the area of any scheduled land, of its value in the opinion of the Land Administrator, and of the apportionment of the compensation awarded by the Land Administrator, whether the persons interested therein have or have not appeared at the enquiry.

[11] As the plaintiff had accepted full payment of the award in respect of Lot 2026 and 75% payment in respect of Lot 1818, without protest or objections s 30(b) of the LAA 1960 would apply. It states:

> Notwithstanding anything contained in section 29 —
>
> (b) any person who has received any payment of any amount awarded otherwise than under protest shall not be entitled to require that his claim be referred to the Court under section 37.

[12] Section 30(b) is a mandatory provision governing a landowner's entitlement to make an objection to an award. It bars him from pursuing his claim under s 37 in court once he has unconditionally accepted payment.

[13] In *Zainal Abidin bin Yaakub v Pentadbir Tanah Daerah Melaka Tengah* [1996] 5 MLJ 577, it was held:

> It is therefore clear that once payment has been accepted otherwise than under protest, the prohibition contained in s 30(b) of the Act will then be activated and, in consequence thereof, such a landowner will not be entitled to change his mind and require that his claim be referred to the court under s 38 of the Act. In that event the question of enlargement of time to make an objection does not arise for the simple reason that the right to object does not exist. The rationale behind s 39(b) of the Act is obvious. Once a person has received an award without protest he is esstopped from protesting later based on the doctrine of election.

[14] From a plain reading of s 30(b) and s 37(1) of the LAA 1960, which are explicit and unequivocal in their terms, it is crystal clear that the plaintiff is not entitled to refer its claim to the court under s 37. The authorities referred to have interpreted these sections strictly. A person who has accepted the award without protest loses the locus or right to challenge the award pursuant to s 37. (*Lee Ah Mok & Ors v Pentadbir Tanah Daerah Seremban & Anor*.)

[15] Hence, in the circumstances of this case, the question of enlargement of time to file the reference in court would not arise as the plaintiff was not competent to make the claim. I upheld the contention of D2 that by reason of what is clearly spelt out in s 29, this application should be dismissed outright without even considering whether the plaintiff is entitled to be granted extension of time under s 38(4) of the LAA 1960. The plaintiff is already estopped from referring its claim to the court.

SECTION 38(3)(a) OF THE LAND ACQUISITION ACT 1960

[16] This section provides that any objections under s 37 of the LAA 1960 shall be made within six weeks from the date of the LA's award under s 14 of the LAA 1960.

[17] Section 38(4) of the LAA 1960 authorises the court to allow extension of time to file objections as follows:

> The period of six weeks prescribed by subsection (3) (a) and the periods of six weeks and six months prescribed by subsection (3)(b) shall not be capable of enlargement by any Court, except in such special circumstances as the Court may think fit.

[18] Both parties referred to the case of *Lau Cher Hian v Collector of Land Revenue, Muar* [1971] 1 MLJ 96 where Ong (CJ), said in obiter:

> This was a case of 'indifference' or an applicant sleeping upon his rights. The appellant had done all that she was advised by the notice to do.

A 'Special grounds' were not defined and rightly so. Was not hardship a special ground, when the party was not in the least at fault? Except that she did not possess the volume of 1960 legislation for reference was she so much to blame? I do not think that hardship, bona fide mistake or mere 'ignorance of the law' should be left out altogether when considering special grounds. What are special grounds must be decided according to the facts of each case. Section 44(2) I think affords an example of what should be considered a special ground, viz —

B

(2) The court shall consider the interests of all persons interested who have not accepted the award, whether those persons have themselves made an objection or not.

C

[19] In *Sungei Bongkoh Estate Sdn Bhd v Pentadbir Tanah Daerah Kuala Muda* [1994] MLJU 441 cited with approval by the Federal Court, Hishamudin Mohd Yunus JC (now JCA) in finding that a delay of six months was excessive held:

D

In my view the onus of proving special circumstances lies on the plaintiff, and to discharge that burden, the plaintiff, in my opinion, must show to the Court not just the fact of the failure to effect service of the Borang H (in accordance with Part VI of the Act) on them; the plaintiff must also show that the failure on the part of the defendant to serve on them the Borang H substantially contributed to the delay on his part in filing his objection.

E

[20] The court is empowered to enlarge time beyond the six weeks prescribed on condition that special circumstances exist. This is in the case of a plaintiff who has the locus or right to challenge the award by not accepting the award or accepting it under protest which does not apply to the present plaintiff. However, the discretionary power under s 38(4) must be exercised cautiously and judicially bearing in mind that it is mandatory that special circumstances must be shown to exist before enlargement of time can be granted. The onus lies on the plaintiff to satisfy the court that such circumstances do in fact exist. An important factor that would warrant serious consideration is whether there was an inordinate delay in filing the application under s 38(3)(a). A delay running into years — almost six years in the instant case — would pose an insurmountable obstacle to allowing reference of the claim to the court.

F

G

H

[21] In support of this application, the plaintiff relied principally or the purported administrative error by D1 which it was contended would amount to special circumstances. The said administrative error was argued to be as follows:

I

(a) the entire compensation of the acquisition of part of the said Estate Lands (amounting to RM8,444,800) was erroneously placed into Lot 1818; and

(b) in respect of the increased compensation granted by the Assistant Land

Administrator (ie 10% increase for Lots 1818 and 2026) and injurious affection compensation (for Lot 2026) of RM35,041,356 was erroneously placed into Lot 2026.

It was submitted that as a result of the above error, a wrong impression had been created by the erroneous award for Lot 1818 that it was unjustifiable and manifestly excessive. The award of RM8,444,800 confined to Lot 1818 did not give the correct impression that it was in fact as compensation for market value of both Lots 1818 and 2026.

[22] The plaintiff alleged that D2's land reference was mala fide as it had taken advantage of the aforesaid error by filing an objection for Lot 1818 only on the sole premise that the compensation was excessive and unjustifiable. In support of this allegation, the plaintiff further alleged that plaintiff had full knowledge that the award was an agreed compensation between the plaintiff and D2 and that, it was awarded for both Lots 1818 and 2026.

[23] The plaintiff's objection was submitted to be necessary in order for the court to arrive at a just and fair decision in D2's land reference as otherwise, the plaintiff would be severely prejudiced in the sense that in all likelihood the plaintiff would eventually not receive any compensation for the acquisition of a portion of Lot 2026. Finally, that an unjust outcome would be contrary to the spirit and intention of the LAA, 1960 and art 13 of the Federal Constitution.

[24] As regards the so-called agreement between the parties it is deposed to in the affidavit of the plaintiff that on 8 December 2005 upon D1's proposal to increase the offer of compensation by 10%, an understanding or agreement had been reached between the representatives of the plaintiff and D2 that both parties would not file any objections against D1's award. D2 denied this assertion of fact.

[25] D2 submitted that this allegation was being conjured up almost six years after the inquiry held on 6 December 2005. Suffice to say that there is absolutely no evidence or material on record to even remotely support the plaintiff's belated allegation of any agreement or understanding having been reached as above or representation having been made by D2. As such the question of D2 having reneged on the agreement or understanding would not arise.

[26] As for the purported administrative error by D2, the record speaks for itself. The plaintiff took no steps and made no attempts to rectify the record for more than five years even after having accepted substantial payment on the awards. The statutory documents Form G and Form H clearly attest to two

separate awards and two offers of compensation for the two lots in question. Hence, the assertion of administrative error which was not borne out by the documentary evidence was untenable.

[27] As for the allegation that D2 had acted mala fide or had taken unfair advantage of the purported administrative error when filing Form N, I agree with D2's submission that it was nothing short of being incredulous. D2 had in doing so sought recourse to the avenue provided by law in LAA 1960 when asking for a review of the award for Lot 1818 only for the matter to be adjudicated by the Land Reference Court under the relevant provisions of the LAA 1960.

[28] On my finding that the plaintiff had failed to establish the factual basis of its assertion that special circumstances exist in this case, I held that, thereby, the plaintiff had failed to discharge the onus of proof placed on it under s 38(4) of the LAA 1960. The plaintiff had, therefore, failed to satisfy the court that it had valid and sufficient grounds for enlargement of time to be granted under this section. Inter alia, in the absence of compelling and convincing circumstances, a delay of almost six years was far too excessive and unacceptable.

[29] On the constitutional point of deprivation of the plaintiff's fundamental right to property under art 13 of the Federal Constitution if this application is not favourably considered, my attention was rightly drawn to the case of *Singapore Para Rubber Estate Ltd v Pentadbir Tanah Daerah Rembau, Negeri Sembilan* [2008] 6 MLJ 763 which held:

> It follows therefore if all the provisions of the Act have been duly complied with and the compensation due is also offered, the Land owners cannot complain of any violation of art 13 of the Federal Constitution.

The plaintiff in this case was duly compensated for acquisition of its lands in accordance with due process and payment was duly accepted without raising any complaint. Hence, the denial of its constitutional right under art 13 would not arise as the acquisition was in accordance with law.

DECISION

[30] In view of the foregoing, I declined to exercise my discretion in favour of allowing the application for enlargement of time for reference to the court against the award of the first defendant. To sum up, by virtue of s 30(b) of the LAA 1960.The plaintiff was not entitled to require that its claim be referred to the court under s 37 as it had received payment of the amounts awarded otherwise than under protest. Even if enlargement of time to file the claim can be considered under s 38(4) of the LAA 1960. The plaintiff had on the evidence

failed to satisfy the special circumstances test for the court to exercise its discretion under this section. I, therefore, dismissed this application with costs.

Application dismissed with costs.

Reported by Kanesh Sundrum